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Convention on jurisdictional immunities of States and their property

Convention on jurisdictional immunities of States and their property

Report of the Secretary-General**

Contents

		Page
I.	Introduction	2
II.	Replies received from States	2
	Antigua and Barbuda	2
	China	2

* A/56/150.
** The present report contains the replies received as at 15 August 2001.

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I. Introduction

1. By paragraph 2 of its resolution 55/150 of 12 December 2000, entitled "Convention on jurisdictional immunities of States and their property", the General Assembly urged States, if they had not yet done so, to submit their comments to the Secretary-General in accordance with Assembly resolution 49/61 of 9 December 1994, and also invited States to submit in writing to the Secretary-General, by 1 August 2001, their comments on the reports of the open-ended working group of the Sixth Committee established under resolutions 53/98 and 54/101.

2. By paragraph 2 of its resolution 49/61, the Assembly invited States to submit to the Secretary-General their comments on the conclusions of the chairman of the informal consultations held pursuant to Assembly decision 48/413 of 9 December 1993, and on the reports of the Working Group established under Assembly resolution 46/55 of 9 December 1991 and reconvened pursuant to its decision 47/414 of 25 November 1992.

3. By a note dated 28 December 2000, the Secretary-General invited States to submit comments in accordance with paragraph 2 of Assembly resolution 55/150.

4. The present report contains the replies received as at 15 August 2001. Any replies which may subsequently be received will be reproduced as an addendum to the present report.

5. The present report supplements the replies received from States pursuant to paragraph 2 of Assembly resolution 49/61 (see A/52/294). The present report also supplements replies received from States pursuant to paragraph 2 of Assembly resolutions 52/151 of 15 December 1997 and 54/101 of 9 December 1999 (see A/53/274 and Add.1, A/54/266 and A/55/298).

II. Replies received from States

Antigua and Barbuda

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[26 April 2001]

The Permanent Mission of Antigua and Barbuda, with reference to Assembly resolution 55/150, is in full accordance with what is called for and is, in particular, in strong support of an ad hoc committee on jurisdictional immunities of States and their property.

China

[Original: Chinese]
[19 July 2001]

General comments

1. According to traditional international law, States and their property enjoy absolute jurisdictional immunities but, in recent years, the practice of States on this subject differs greatly. Some States apply the principle of absolute immunity, others the principle of restrictive immunity; even for States applying the principle of restrictive immunity, rules of internal laws vary. Therefore, the Government of China considers that for the topic of jurisdictional immunities of States and their property, it is imperative that a uniform rule be adopted.

2. The Government of China also believes that an international rule adopted for such an important subject should be legally binding and operational, so that it could be applied directly by national courts in dealing with relevant cases. Thus, convening a diplomatic conference to adopt a convention is the best way truly to realize the goal of harmonizing the law and practice of States in the area of State immunity.

3. The draft articles adopted by the International Law Commission on this topic after years of deliberation provide a solid basis for States to adopt a uniform norm of international law on this topic. The Sixth Committee achieved substantial progress in its work during the fifty-fourth and fifty-fifth sessions of the General Assembly, and States were able to make progress on some important questions, thus we are hopeful that a convention could be adopted. Efforts are still needed to resolve the remaining substantive questions, but discussion in the Sixth Committee during the past two sessions of the Assembly indicates that it is possible for States to achieve consensus on those questions.

Specific comments

4. The following are preliminary comments and observations of the Government of China on some of the important questions regarding this topic. The

Government of China reserves the right to make additional comments on these questions or to make comments and observations on other questions relating to this topic in the future.

Article 2, paragraph 2, concerning tests for determining a commercial transaction

5. Article 2 establishes the principle that if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. The Government of China endorses this principle but, in determining whether a contract or transaction is a commercial transaction under the Convention, applying only the "nature" test of article 2, paragraph 1 (c), is far from adequate — the purpose of the State for engaging in the transaction must also be considered. Adopting a rule on jurisdictional immunities of States and their property would no doubt provide protection for natural or juridical persons involved in the transaction, but this should not jeopardize the public purpose of the State for engaging in the transaction. A balance must be struck between the "nature" test and the "purpose" test to protect the property of States used for public purposes under exceptional circumstances. It has been argued that the "nature" test is ambiguous, since it seems possible to identify certain public purposes in every transaction that is carried out by a State. In this respect, the Government of China believes that applying the "nature" test in no way provides additional protection for commercial transactions carried out by a State; its purpose is not to disregard the special interest of a State under exceptional circumstances, such as the procurement of food supplies to relieve a famine situation, purchase goods to revitalize an affected area, or supply medicaments to combat a spreading epidemic. The "purpose" test may not have clear and concise determining criteria as the "nature" test, but it is by no means impossible to apply. If, in practice, the purpose of a State engaging in a given commercial transaction is indeed relevant to the determination of the non-commercial nature of the contract or transaction, the defendant State should be given an opportunity to prove its case. The Government of China agrees in principle with the views of the International Law Commission as reflected in its commentary on the draft articles adopted on second reading. The Commission views the "purpose" test as a supplementary standard employed to minimize unnecessary disputes which could arise from differences in State practice if only the "nature" test is applied. Applying the "purpose" test would not hamper the flexibility of national courts in making judicial interpretations when dealing with relevant cases, but would provide guidance to Governments, courts and enforcement officials, and ensure that relevant factors concerning the contract or transaction are taken into consideration.

6. In sum, the Government of China considers that article 2, paragraph 2, of the 1991 draft articles is a reasonable text, reflecting an appropriate balance between the "nature" test and the "purpose" test and takes into full consideration the practice of States.

Article 10, concerning commercial transactions

7. It is the view of the Government of China that, in principle, a State enterprise or other entity established by a State does not enjoy State immunity if that State enterprise or other entity has an independent legal personality and is capable of suing or being sued, acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage. It is the understanding of the Government of China that the basis for determining whether a State enterprise or other entity has an independent legal personality should be the provisions of the internal law of the State concerned. Therefore, article 10, paragraph 3, should be reformulated to read "... a State enterprise or other entity established by the State which has an independent legal personality *in accordance with the internal law of that State* and is capable of: ...". According to the relevant laws of China, Chinese State enterprises and other entities established by the State have independent legal personality.

8. The Government of China also believes that a clear distinction should be drawn between States and State enterprises or other entities established by States. A State enterprise or other entity established by a State should assume civil liability for itself, and a State should not be jointly and severally liable for the commercial activities and the liabilities or obligations of any of its State enterprises or other entities, unless the State enterprise concerned has an agency

relationship with the State in the transaction or the State enterprise is authorized to perform acts in the exercise of the sovereign authority of the State. Thus, it is important for article 10, paragraph 3, of the draft articles to stress that the immunity from jurisdiction enjoyed by a State should not be affected in a proceeding brought against its State enterprises or other entities. This could prevent abuse of the judicial process by the plaintiff.

9. Therefore, the Government of China considers that article 10, paragraph 3, of the 1991 draft articles is acceptable with the following reformulation: "... a State enterprise or other entity established by the State which has an independent legal personality *in accordance with the internal law of that State* and is capable of: ...".

Article 18, concerning State immunity from measures of constraint

10. The Government of China considers that, in theory, immunity from measures of constraint is separate from jurisdictional immunity, and the consent of a State to the exercise of jurisdiction of the court of another State should not imply its consent to the taking of measures of constraint, for which separate consent should be necessary. Moreover, compared to immunity from jurisdiction, immunity from measures of constraint is more akin to absolute immunity. Relevant international practice also supports such a view. Therefore, the Government of China considers that, in principle, the provision of article 18 of the 1991 draft articles is acceptable.

11. However, some improvements are still needed to article 18. The most serious concern is that article 18 fails to differentiate between pre-judgement measures of constraint and post-judgement measures of constraint. The Government of China believes that, in general, the question of immunity from measures of execution arises only after a national court has rendered a judgement in favour of the plaintiff. In principle, measures of constraint should not be implemented against State property before judgement. This would prevent national courts from abusing measures of constraint, causing harm to the property of a foreign State. This is particularly true in cases where there are serious disputes on the question of jurisdictional immunity. If national courts are permitted to implement measures of constraint against the property of a defendant State before judgement is rendered, the State property of the defendant State, in particular property involved in a public purpose transaction, could suffer unnecessary harm. Thus, the Government of China supports the separate treatment of pre-judgement measures of constraint and post-judgement measures of constraint, either in two separate paragraphs within article 18 or in two completely separate articles. It should also be stressed that the consent of the defendant State is required for implementing pre-judgement measures of constraint.

12. For post-judgement measures of constraint, the Government of China considers that, in principle, consent of the defendant State is also essential for the execution of such measures, especially in cases in which the defendant State is still contesting the jurisdictional immunity question. When a national court implements measures of constraint against the property of a defendant State without its consent, not only would such an action violate the famous legal axiom of *par in parem imperium non habet*, it could also strain relations between the two States. Therefore, there should be room for the Governments of the two States to resolve the question through diplomatic channels and the arbitrary enforcement of measures of constraint avoided.

13. The Government of China also believes that whenever a court takes measures of constraint against the property of a defendant State, the following conditions must be fully satisfied: (a) the property is in the territory of the State of the forum; (b) the property is specifically in use or intended for use by the State for other than government non-commercial purposes; (c) the property has a connection with the claim which is the object of the proceeding, or with the agency or instrumentality against which the proceeding was directed. The last condition is of special significance, as it is an important criterion for differentiating the property of a State from that of a State enterprise or other entity, and for differentiating the property of the various State enterprises and other entities. The Government of China believes that obligations of a State enterprise or other entity having an independent legal personality should be settled with the property of that State enterprise or other entity and not with the property of the State to which it belongs or with the property of other enterprises or entities. Similarly, obligations of a State should only be settled with property directly possessed by the central government of that State and not with the property of its State

enterprises or other entities. Absence of a strict limitation on the property subject to measures of constraint invites the possible misuse of such measures by a court with respect to the property of the defendant State or the property of other State enterprises or entities not related to the proceeding, and could cause uncertainty and inconsistency in the implementation of measures of constraint by national courts. Therefore, the Government of China endorses the text of article 18, paragraph 1 (c), of the 1991 draft articles.

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Item 131 (b) of the provisional agenda*
Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Strengthening United Nations action in the field of human rights through the promotion of international cooperation based on the principles of non-selectivity, impartiality and objectivity

Report of the Secretary-General**

I. Introduction

1. In its resolution 55/104 of 4 December 2000, the General Assembly requested the Secretary-General to invite Member States to present practical proposals and ideas that would contribute to the strengthening of United Nations action in the field of human rights through the promotion of international cooperation based on the principles of non-selectivity, impartiality and objectivity, and to submit a comprehensive report on this question to the Assembly at its fifty-sixth session, and decided to consider the matter at that session under the item entitled "Human rights questions".

2. Pursuant to the above-mentioned request, the Secretary-General, in a note verbale dated 11 May 2001, invited Member States to present their practical proposals and ideas and, as at 27 July 2001, four replies had been received (see sect. II below).

II. Replies received from Governments

Cuba

[Original: Spanish]
[3 July 2001]

3. The Government of Cuba considers that respect for the principles of objectivity, impartiality and non-selectivity in international cooperation in the field of human rights is of capital importance.

4. United Nations action in this field should be based not only on a profound understanding of the broad range of problems existing in all societies but also on full respect for the political, economic and social realities of each of them, in strict compliance with the purposes and principles of the Charter of the United Nations and for the basic purpose of promoting and encouraging respect for human rights and fundamental freedoms through international cooperation.

5. However, Cuba notes with growing concern that the prevailing situation of the work of the bodies and

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** In accordance with General Assembly resolution 55/222, part III, para. 10, the present report is submitted on 13 August 2001 so as to include as much updated information as possible.

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mechanisms of United Nations machinery for the promotion and protection of human rights falls far short of the ideal of international cooperation in this field.

6. A handful of rich and powerful nations of the North are increasingly endeavouring to exercise political manipulation on the Commission on Human Rights and other intergovernmental human rights bodies to impose their views and their interests on other countries in the process of development, in short, on the great majority of mankind.

7. They attempt to establish a single yardstick of democracy and governance, claiming to apply it to all nations without taking into consideration their historical, cultural, ethnic and other characteristics. Those which do not conform to the model are demonized. Resolutions condemn them and punitive mechanisms are brought to bear on them even when this means resorting to the basest forms of pressure and blackmail.

8. For more than 10 years now, all resolutions on violations of human rights adopted by the Commission on Human Rights and in the Third Committee of the General Assembly have related to countries of the South and have been submitted, in almost all cases, by countries of the North, for the most part former colonial or neocolonial metropolitan powers which continue to try to dominate their traditional spheres of influence.

9. In more than 50 years of existence, the Commission on Human Rights has still not been able to adopt a resolution condemning human rights violations in industrialized Western countries. Yet, the visits by thematic rapporteurs to some of those countries, the analysis of the recommendations made by the treaty bodies and even the reports of the non-governmental human rights organizations themselves have provided ample evidence to justify the adoption of resolutions, the creation of special procedures and the permanent monitoring by the Commission of the situations prevailing in many of those countries with regard to human rights violations, in particular the United States of America.

10. Silence in the face of violations of the rights of minorities, of migrant workers, of indigenous populations and of the underprivileged sectors of the countries of the industrialized North legitimize and, in practice, facilitate the impunity of the authorities of those countries. The existence of markedly racist and xenophobic political institutions and of aberrant practices, such as the use of the Internet to disseminate such ideas, is permitted and even justified.

11. The composition of the staff of the Office of the United Nations High Commissioner for Human Rights, who are required to play an important role in supporting the work of the mechanisms of the Commission on Human Rights, in preparing reports and in furnishing technical advisory services to developing countries, is not fairly balanced geographically to permit an adequate representation and comprehension of the various cultures, civilizations, religions and legal, political and philosophical systems.

12. Economic, social and cultural rights and the right to development continue to be relegated away from the international community's focus of attention and continue to be the invisible part of human rights programmes as a result of the imposition of the hegemonic priorities and interests of a few developed nations.

13. Punitive approaches to developing countries are still favoured and resources for activities to promote human rights continue to dwindle, in particular for activities relating to technical cooperation, human rights education and education in general.

14. Efforts are made to replace cooperation and dialogue with the imposition of the so-called "right of intervention on humanitarian grounds"; this is, of course, used selectively in cases in which the political, economic or military considerations of the major powers so advise.

15. The Government of Cuba considers it an obligation to denounce these situations and to contribute to making all Member States and the community of non-governmental organizations aware of the need to replace the prevalent confrontation with genuine, dialogue-based cooperation, as endorsed by the Charter.

16. The universality of all human rights will only become a reality when the differences and the special features of every human being and every people are respected. All attempts at imposition and domination destabilize and discredit the international system for the promotion and protection of human rights.

17. The Government of Cuba confirms its desire to work towards the pressing goal of making the letter and spirit of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, a reality. The promotion, protection and full realization of all human rights and fundamental freedoms can only be attained if there is full respect for the principles of non-selectivity, impartiality and objectivity.

Qatar

[Original: Arabic]
[4 July 2001]

18. The international community should deal with human rights in an equitable and non-discriminatory manner and, to this end, show due respect and regard for the implications of national and regional particularities and differing historical, cultural and religious backgrounds.

19. The exploitation of human rights for the achievement of political and economic objectives is incompatible with the Charter and principles of the United Nations which, in particular, call for recognition of, and full respect for, the principle of the inviolability of the sovereignty and independence of States and the principle of non-interference in their internal affairs, in keeping with the spirit and the aims of the Universal Declaration.

20. The utmost importance should be attached to the principles of objectivity, non-selectivity and transparency in order to promote and encourage respect for human rights.

21. The effective promotion and protection of human rights should be based on the strengthening of international cooperation and the development of a general consensus instead of confrontation.

Guatemala

[Original: Spanish]
[4 July 2001]

22. The State of Guatemala, as part of the process of post-conflict democratization, on which it embarked in the wake of the cessation of the internal armed struggle through the signing of the Agreement on a firm and lasting peace, is devising programmes, projects and strategies to secure the respect and realization of human rights through a variety of activities carried out by executive, legislative and judicial institutions. It should be emphasized that governmental and non-governmental organizations have coordinated their efforts aimed at human rights education, training and observance.

23. The executive has now drawn up a draft national human rights policy for the State of Guatemala, the purpose of which is to propose a plan of action on human rights that entails the adoption of practical measures for the promotion and respect of human rights.

24. The State of Guatemala, aware that it is only through cooperation within the international community that Member States and, above all, developing countries, will be able to carry through a democratic process to ensure the observance and realization of human rights, is of the opinion that pursuit of the activities outlined below might strengthen United Nations action in this field.

Awareness-raising and prevention

25. In order to achieve this goal, the participation and cooperation of the United Nations is required when carrying out the following: conducting surveys on the human rights situation in a country; cooperating with consultants in order to implement plans and projects concerning human rights; holding regional seminars to identify the causes of infringements of human rights and formulating analyses and guidelines on ways of realizing those rights; drafting studies of the socio-economic characteristics of society in each Member State; setting up practical machinery for the effective protection of human rights by the United Nations; provision of advice by United Nations experts on the implementation of each international instrument; financial backing for the mounting of publicity campaigns to secure the implementation and respect of human rights; and training of public officials by experts on human rights treaties and conventions.

Follow-up

26. The following measures could be carried out in order to monitor the efficacy of the above-mentioned activities:

(a) Preparation of publications by the United Nations on progress made in and obstacles to the

discharge of the obligations contained in the various international treaties, for the consumption of the general public;

(b) Coordination and communication between public officials in each Member State and experts and special rapporteurs with a view to updating United Nations resolutions.

Iraq

[Original: Arabic]
[5 July 2001]

27. The Government of Iraq has attached the requisite importance to respect for the principles of non-selectivity, impartiality and objectivity in international cooperation in the field of human rights by constantly drawing attention to the circumstances prevailing in the work of international bodies concerned with human rights, in particular the Commission on Human Rights, the Third Committee of the General Assembly and the human rights treaty-monitoring bodies, owing to the manner in which the principles of human rights are being increasingly exploited for political ends by a number of influential countries seeking to impose their viewpoints and interests on the developing countries, which constitute the majority.

28. The Western countries have endeavoured to impose their own political, economic and cultural model on the developing countries and those that reject that model have been subjected to a series of measures, including condemnation in resolutions adopted by international human rights bodies, economic sanctions imposed in the name of the United Nations, and unilateral coercive measures. It is noteworthy that all the country-specific resolutions adopted by the Commission on Human Rights and in the Third Committee of the General Assembly are usually presented by Western countries, especially those with a colonial history which are still aspiring to recover their former spheres of interest.

29. It is an undeniable fact that, although human rights violations are committed in both Western and developing countries, the Western countries are not subjected to monitoring and control by human rights bodies in the same way as the developing countries owing to the hegemony that the Western countries exercise over the work of those bodies.

30. It is regrettable that the grave and widespread violations of a racist and xenophobic nature that are committed against migrant workers, indigenous peoples and minorities in the Western countries do not receive the earnest attention that they merit from the bodies concerned with human rights.

31. The Western countries attach the utmost importance to civil and political rights but disregard economic and social rights. Some Western countries have even voted against resolutions concerning those rights, in particular the right to development, and others have imposed specific conditions on the provision of economic assistance for developing countries on the pretext of the need to ensure respect for human rights.

32. The Government of Iraq wishes to highlight the concept of the so-called "right of intervention on humanitarian grounds", which is incompatible not only with the provisions of international law currently in force but also with the principles enshrined in the Charter of the United Nations, particularly since it affects concepts such as the sovereignty and territorial unity and integrity of States and non-interference in their internal affairs, the legitimacy of which is well established in international law. The situation in northern and southern Iraq constitutes a flagrant violation of international law insofar as some Western countries, led by the United States of America, have imposed air exclusion zones there on the pretext of protecting the Kurds in the north and the Shi'a population in the south without any clear and explicit mandate in the form of a resolution or authorization by the Security Council, even though those countries claim to be committed to international law and respect for the Security Council resolutions concerning Iraq, all of which emphasize the need to respect the sovereignty and independence of Iraq and to refrain from interfering in its internal affairs. At the same time, we find that the Western countries are turning a blind eye to the gross violations that the Zionist entity is committing against the Palestinian people. In fact, they have voted against Commission on Human Rights resolutions condemning that entity and have prevented the Security Council from providing protection for the defenceless Palestinian people.

33. A further example of selectivity can be seen in the manner in which the United States of America and the United Kingdom of Great Britain and Northern Ireland are insisting on maintaining the economic

embargo on Iraq, even though it has fulfilled its obligations under the terms of the relevant Security Council resolutions concerning the elimination of Iraq's weapons of mass destruction, and in the manner in which they are pressuring the Security Council to refrain from honouring its obligations towards Iraq now that Iraq has fully honoured its own obligations. Those two States are currently endeavouring to impose even harsher and more harmful neocolonial plans on Iraq by putting forward the so-called "smart sanctions" scheme in the Security Council, with a view to subjecting Iraq to an even more stifling blockade after all these years of arbitrary, illegal and inhuman measures.

34. The Government of Iraq calls upon all States to take a stand against these imbalances since, by remaining silent, they would all be aiding and abetting the exploitation to which human rights bodies are being subjected. They should all take advantage of any forum for dialogue in order to help to make States and non-governmental organizations aware of the need to replace the prevailing logic of confrontation with the logic of cooperation in accordance with the Charter.

35. The policy of hegemony and imposition of the patterns, values and interests of a minority of States will undermine and jeopardize the credibility of the international system for the promotion and protection of human rights.